

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

IN RE: ETHICON, INC.,
PELVIC REPAIR SYSTEM
PRODUCTS LIABILITY LITIGATION

MDL No. 2327

THIS DOCUMENT RELATES TO:

Cases identified in Exhibit A attached hereto

ORDER

Pending before the court is the plaintiffs' Motion to Strike the Dr. Shelby F. Thames's Supplemental Reports or, in the Alternative, for Leave to File a *Daubert* Motion [ECF No. 2882]. Ethicon filed its Response [ECF No. 3020]. The plaintiffs' Motion requests exclusion of Dr. Thames's two supplemental reports but also requests that the court, in the alternative, allow them additional time to depose Dr. Thames. For the reasons detailed below, the plaintiffs' Motion is **GRANTED** as to the cases in Exhibit A.¹

I. Background

Pursuant to the Fourth Amended Wave 2 Docket Control Order [ECF No. 1790] ("Docket Control Order"), Ethicon was required to disclose its experts (and their opinions) on or before June 3, 2016. Docket Control Order 1. Discovery closed on July

¹ On Exhibit A, I have marked through cases that are closed, on the inactive docket, not in Wave 1, could not be identified because of an error in the style or case number, or assigned to another District Judge.

1, 2016. *Id.* Further, all *Daubert* briefing was to be completed by August 18, 2016, with *Daubert* motions due July 21, 2017. *Id.* Ethicon timely disclosed Dr. Thames as an expert, along with his initial expert report. In the plaintiffs' Wave 1 *Daubert* motion on Dr. Thames, they questioned the reliability of Dr. Thames's explant cleaning protocol. Mem. Supp. Mot. Exclude Ops. Dr. Thames 8–10 [ECF No. 2042]. It was this argument that prompted the design and execution of a new experiment to test the reliability of his cleaning protocol, to buttress the strength and reliability of his prior opinion. Mot. Strike Ex. B, at 1 [ECF No. 2882-2] ("First Supplemental Report"). Ethicon then served the First Supplemental Report with the preliminary conclusions of this experiment on August 8, 2016, and the Second Supplemental Report with the formal conclusions on September 28, 2016. *See id.* at 1; Mot. Strike Ex. C, at 1 [ECF No. 2882-3] ("Second Supplemental Report"). Both reports were served after the disclosure deadline, motion deadline, and close of discovery.

The plaintiffs argue for exclusion under Rule 37(c) on the grounds that the supplemental reports were untimely served. Mot. Strike 2–3. Ethicon does not dispute that the reports were untimely served and responds that its delayed disclosures were justified and harmless. Ethicon focuses its attention on the five-factor test from *Hoyle v. Freightliner, LLC*, 650 F.3d 321, 329 (4th Cir. 2011). *See generally* Resp.

II. Analysis

Pursuant to Rule 37(c) of the Federal Rules of Civil Procedure,

If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or

witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.

According to the Fourth Circuit, the appropriate factors to consider in determining whether to sanction a party under Rule 37(c) are the following:

(1) the surprise to the party against whom the witness was to have testified; (2) the ability of the party to cure that surprise; (3) the extent to which allowing the testimony would disrupt the trial; (4) the explanation for the party's failure to name the witness before trial; and (5) the importance of the testimony.

Hoyle, 650 F.3d at 329.

I am simply unable to find that Ethicon's late disclosures of Dr. Thames's supplemental expert reports were substantially justified. Dr. Thames has a longstanding relationship with Ethicon, and Ethicon has provided no reason why this testing could not have been done prior to the disclosure of the initial expert report. Essentially, because the plaintiffs questioned the reliability of Dr. Thames's protocol, Ethicon decided to bolster its case by having Dr. Thames perform more testing of the testing. In essence, the supplemental expert reports are atonement for initial inadequacies or incomplete preparation. However, I must also evaluate whether the late disclosures were nevertheless harmless before I can determine whether sanctions are appropriate.

The plaintiffs' arguments support a finding of surprise. Although the plaintiff attacked the adequacy of Dr. Thames's cleaning protocol in their *Daubert* motion, they had no reason to suspect that an entirely new test would be performed to rebut their argument of reliability and then disclosed after the discovery deadline had closed. However, both parties have agreed to allow additional time for *Daubert*

briefing should the reports not be excluded. Thus, the ability to cure the surprise weighs in favor of permitting the reports.

I recognize that a trial date has not been set in this case, and I also recognize that any harm to the plaintiffs regarding this matter may be easily remedied by allowing them to have additional time to depose Dr. Thames. However, I must be particularly cognizant of the realities of multidistrict litigation and the unique problems an MDL judge faces. Specifically, when handling seven MDLs, each containing thousands of individual cases, case management becomes of utmost importance. *See In re Phenylpropanolamine Prods. Liab. Litig.*, 460 F.3d 1217, 1231 (9th Cir. 2006) (emphasizing the “enormous” task of an MDL court in “figur[ing] out a way to move thousands of cases toward resolution on the merits while at the same time respecting their individuality”). I must define rules for discovery and then strictly adhere to those rules, with the purpose of ensuring that pretrial litigation flows as smoothly and efficiently as possible. *See id.* at 1232 (“[T]he district judge must establish schedules with firm cutoff dates if the coordinated cases are to move in a diligent fashion toward resolution by motion, settlement, or trial.”); *see also* Fed. R. Civ. P. 1 (stating that the Federal Rules of Civil Procedure “should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding”). In turn, counsel must collaborate with the court “in fashioning workable programmatic procedures” and cooperate with these procedures thereafter. *In re Phenylpropanolamine*, 460 F.3d at 1231–32. Pretrial orders—and the parties’ compliance with those orders and the deadlines set forth therein—are

the engine that drives disposition on the merits.” *Id.* at 1232. A “willingness to resort to sanctions” in the event of noncompliance can ensure that the engine remains in tune, resulting in better administration of the vehicle of multidistrict litigation. *Id.*; *see also Freeman v. Wyeth*, 764 F.3d 806, 810 (8th Cir. 2014) (“The MDL judge must be given ‘greater discretion’ to create and enforce deadlines in order to administrate the litigation effectively. This necessarily includes the power to dismiss cases where litigants do not follow the court’s orders.”).

The fourth factor, importance of the testimony, also weighs in favor of striking the reports. Both supplemental reports are twelve pages long, whereas the original report is 132 pages long. The testimony contained in the reports does not go to the heart of the case, but instead serves only to enforce the reliability of Dr. Thames’s cleaning protocol. I cannot find that the supplemental reports are crucial to either side’s case.

III. Conclusion

Accordingly, the plaintiffs’ Motion to Strike the Dr. Shelby F. Thames’s Supplemental Reports or, in the Alternative, for Leave to File a *Daubert* Motion [ECF No. 2882] is **GRANTED**.

The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: March 28, 2017

EXHIBIT A

Case	Civil Action Number
Ankenman, Cathleen & John J.	2:12cv00872
Kowalski, Judith Mary	2:12cv01323
Hart, Mary Ann & William J.	2:12cv01326
Schroeder, Carreen & Matthew	2:12cv01327
Almendarez, Angela M.	2:12cv01329
Hines, Lynn & Gregory	2:12cv01331
Rose, Lola	2:12cv01336
Vandergriff, Debbie & Carl	2:12cv01342
Eaton, Cynthia & Frank	2:12cv01348
Aldrich, Jacqueline Marie & Darryl	2:12cv01364
Higgins, Susan & Bob	2:12cv01365
McDonald, Maria & Thomas	2:12cv01366
Glasgow, Carol	2:12cv01367
Valle, Maritza	2:12cv01368
Thomas, Mary	2:12cv01370
Fitzgerald, Alina & Christopher	2:12cv01371
Boudreau, Linda L. & Charles J.	2:12cv01373
Simpson, Sherry Gill & Ricky	2:12cv01414
Watson, Sandra Rosalie & Earl L.	2:12cv01426
Brady, Victoria Lee & Maurice Joseph	2:12cv01428
Mickle, Karen	2:12cv01432
Grayson, Pamela Sue	2:12cv01435
Pocztowski, Debra	2:12cv01470
Perry, Mary Lou	2:12cv01477
Ford, Deborah K. & Donald K. Blowers, Jr.	2:12cv01486
Brown, Valerie	2:12cv01489
Blackston, Ossie & John	2:12cv01493
Martin, Diann & Donald	2:12cv01495
Schomer, Margaret A.	2:12cv01497
Smith, Patricia G. & Mark	2:12cv01498
Cruse, Peggy D.	2:12cv01501
Raney, Barbara A. & Marcus	2:12cv01507
Espinoza, Rhondi	2:12cv01517
Majors, Jennifer A. & Jonathan S.	2:12cv01523
Flanigan, Iris & Earl David	2:12cv01524
Gologan, Didina & Alexandru	2:12cv01528
Burton, Kimberly Lee & Christopher Carl	2:12cv01529

Chase, Alvette	2:12cv01533
McGathey, Elizabeth M.	2:12cv01538
Ferguson, Teresa	2:12cv01544
Crews, Lillie Harriet & Wain E.	2:12cv01549
Spitzner, Bobbie Dianne & James W.	2:12cv01552
Sanders, Melissa & Charles, Jr.	2:12cv01562
Amidei, Betty	2:12cv01563
Childress, Sandra & Timothy	2:12cv01564
Cottrell, Teresa & Joe Palazzolo	2:12cv01565
Harper, Kathy	2:12cv01567
Wilson, Marcia & Robert	2:12cv01568
Rasos, Katherine	2:12cv01599
Walkingstick, Margaret Christine	2:12cv01616
Smythia, Rebecca	2:12cv01622
Smith, Andora	2:12cv01623
Lindberg, Patricia & Carl	2:12cv01637
Perez, Leezel & Jeffrey	2:12cv01640
Cole, Phyllis Smith & Willie Ray	2:12cv01645
Guffey, Gail	2:12cv01650
Hatfield, Nona & Billy Ray	2:12cv01657
Moore, Phyllis	2:12cv01659
Cooper, Jennifer & Dave	2:12cv01660
Carter, Tamara & David	2:12cv01661
Smallwood, Nancy & Leon, Sr.	2:12cv01662
Glenn, Rhonda & Era Fox, III	2:12cv01663
Allen, Diana & Timothy	2:12cv01676
Fleck, Jean E.	2:12cv01681
Lenz, Debera & Robert	2:12cv01692
Mooney, Konnie L. & James	2:12cv01695
Miller, Mona	2:12cv01696
Bailey, Pamela & Houston	2:12cv01700
Cedeno, Joyce	2:12cv01701
Colbert, Rhonda & Joseph	2:12cv01702
Hoch, Susan & Christopher	2:12cv01703
Johnson, Cynthia & Robert	2:12cv01704
Meyer, Linda & Steve	2:12cv01705
Muir, Marilyn & Scott	2:12cv01706
Shelton, Mary & Frank	2:12cv01707
Shennum, Janice	2:12cv01708
Swanson, Karen & Thomas	2:12cv01709
Parker, Belinda	2:12cv01710

Hutchison, Deanna Gail	2:12cv01711
Suter, Carol Ann & Troy W.	2:12cv01712
Denton, Shirley & Marvin	2:12cv01719
Frazier, Margaret & William Allen	2:12cv01731
Raines, Myra & Kenneth	2:12cv01735
Rhodes, Rebecca & Scott	2:12cv01736
Sidwell, Loretta & Jimmy	2:12cv01737
Williamson, Betty & Donald	2:12cv01739
Gibson, Susan & Michael	2:12cv01740
Savage, Stacey D. & Ebbie E. Ferrell	2:12cv01743
Blevins, Vickie Lea & Robert Oliver	2:12cv01746
Slade, Sebrina & Eric	2:12cv01753
Paris, Christin & Michael	2:12cv01759
Young, Tina L. & Jeffrey	2:12cv01772
Patrick, Lottie M. & John D.	2:12cv01776
Lane, Ann Jennette & Daniel Mark	2:12cv01785
Cutter, Jenesta & Larry A.	2:12cv01790
Burnett, Mary K.	2:12cv01795
Heuer, Myra	2:12-cv-01796
Hammett, Carolyn R.	2:12cv01802
Brookman, Lesley Mitchell & Michael	2:12cv01803
Merten, Janet & Gerard	2:12cv01817
Zutovsky, Linda & Leonard	2:12cv01818
Sierra, Ana & Luis	2:12cv01819
Hemingway, Veda & Gary	2:12cv01829
Strickland, Deborah J. & Matthew	2:12cv01830
Guy, Sheryl C.	2:12cv01831
Gray, Wanda	2:12cv01832
Abell, Emily S. & Michael K.	2:12cv01833
Bishop, Cheryl L.	2:12cv01834
Symank, Bernie & Herman	2:12cv01836
Franklin, Betty	2:12cv01837
Gallehugh, Michelle & Ronnie	2:12cv01838
Parton, Lori Anne Copeland, Executrix of the Estate of Sue Bilbrey Copeland, deceased	2:12cv01848
Peterson, Winnie Elise	2:12cv01849
Jernigan, Joan E. & Fred T.	2:12cv01850
Luna, Tracy L.	2:12cv01853
Hays, Brenda & Roger	2:12cv01855
Sutton, Martha	2:12cv01857
Hensley, Mary M.	2:12cv01858

Bowles, Phyllis & Charles	2:12cv01865
Rogers, Ruby G. & Dwayne L.	2:12cv01877
Irwin, Priscilla A. & Daniel S.	2:12cv01878
Dycus, Myrtle Frances	2:12cv01879
Henry, Lana & Phillip Dean	2:12cv01938
Garland, Marian	2:12cv01939
Young-Poole, Brenda	2:12cv01962
Riggs, Donna & Gary	2:12cv01967
Zapata, Sandra	2:12cv01972
Slocumb, Kathryn	2:12cv01974
Hughes, Brenda L. & Ronnie	2:12cv01976
Poole, Cheryl & Kenneth	2:12cv01978
Devoe, Debra & Randy	2:12cv01979
Moon, Carolyn	2:12cv01980
Covington-Branker, Barbara M. & Brian B.	2:12cv01983
Cope, Michele A. & Barry	2:12cv01984
De Forrest, Patricia Ann & John H.	2:12cv01985
Cambre, Terri I.	2:12cv01986
Trimper, Carolyn S.	2:12cv01987
West, Peggy Sue & Larry R.	2:12cv01988
Phillips, Eleanor F. & John R.	2:12cv01989
Higgins, Anna R.	2:12cv01990
Brennon, Rebecca J.	2:12cv01995
Carr, Gwendolyn N. & Rundell D.	2:12cv01996
Bates, Diane	2:12cv02020
Bowers, Betty Jean	2:12cv02022
Beard, Gavie & Kenneth	2:12cv02025
Carroll, Margaret	2:12cv02026
Gullett, Brenda & Carl	2:12cv02027
Maddox, Brenda	2:12cv02028
Martin, Phyllis	2:12cv02029
Peterson, Tracy & Kevin	2:12cv02030
Reed, Deborah F. & Dale K.	2:12cv02059
Chrysler, Marion	2:12cv02060
Heddle, Bridget	2:12cv02071
Pratt, Cathy	2:12cv02072
Hernandez, Toni	2:12cv02073
Dawson, Kristen	2:12cv02074
Daugherty, Angela & Jimmy	2:12cv02076
Marshall, Natalie C. & David R.	2:12cv02077
Hand, Wanda M. & Charles W.	2:12cv02079

Burns-Martin, Dayna & Kevin	2:12cv02081
Brady, Deborah D.	2:12-cv-02086
Hicks, Shannon H. & James D.	2:12cv02094
McClain, Barbara Sue	2:12cv02095
Roberts, Brenda C. & Dwight	2:12cv02096
Clay, Crystal Lynn	2:12cv02097
Wilson, Tina	2:12cv02099
Scott, Teresa	2:12cv02100
Bishop, Jessie	2:12cv02101
Whinery, Joyce	2:12cv02102
Nelson, Kathryn M.	2:12cv02103
Loomis, Barbara & Dighton	2:12cv02104
Minogue, Bridgette	2:12cv02112
Doucette, Karen L.	2:12cv02125
Dunham, Lynne & David	2:12cv02131
Ursini, Tara	2:12cv02132
Anderson, Elaine	2:12cv02134
Crabtree, Reba & Jack	2:12cv02135
Lary, Sheryl & Kevin E.	2:12cv02136
Manor, Kristy & John E., III	2:12cv02137
Maxwell, Bonnie	2:12cv02138
Lewis, Marlene	2:12cv02139
Messina, Laritza & John	2:12cv02140
Morrison, Laura	2:12cv02141
Panske-Phillips, Emma & Luther Y., Jr.	2:12cv02142
Phillips, Ramona	2:12cv02143
Pitts, Michelle	2:12cv02144
Green, Janice	2:12cv02148
Pippin, Laura & Donald	2:12cv02152
Bihlmeyer, Donna & Joe	2:12cv02159
Semere, Yvonne	2:12cv02160
Hreiz, Amy Elizabeth & Adel Elias	2:12cv02165
Villarreal, Katherine & Carlos	2:12cv02167
Ogletree, Linda J. & John A.	2:12cv02168
Partin, Patricia Graham	2:12cv02179
Pageau, Tina Marie	2:12cv02180
Lambert, Corrie Ann & Ronson	2:12cv02183
Martin, Patricia J. & Dennis R., Sr.	2:12cv02185
Miller, Rose M.	2:12cv02187
Pieper, Laura & Mike	2:12cv02189
Pridmore, Hope Elaine & James O.	2:12cv02190